Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 87-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHERIFF JACK HEARD,
Petitioner

v.

MILLICENT CURRY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the failure to include a summons in the service of a complaint in a case brought under 42 U.S.C. § 1983 is a defect of service.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This suit was filed by Plaintiff Millicent Curry on September 2, 1983 against Defendant Sheriff Jack Heard and other Defendants who are no longer a part of this action.

The complaint was timely filed and a copy of the complaint was delivered to and received by Defendant Sheriff

Heard, however, unbeknownst to Plaintiff, a summons was not forwarded to Defendant. (Res. App. A).

On March 29, 1984, an order of dismissal was filed and the case was dismissed for want of prosecution. (Pet. App. F). On April 4, 1984, Petitioner filed a Motion to Reinstate reflecting the belief that Defendant had been served. On May 9, 1984, the case was reinstated. Plaintiff notified Defendant by letter dated April 3, 1984, of Defendant's failure to answer. (Res. Ex. B). Defendant did not respond. Plaintiff filed an Application and Notice for Entry of Default on July 20, 1984. The District Court ordered the Defendant to show cause why the Court should not grant Plaintiff's motion. In response the Defendant indicated the Plaintiff failed to include a summons with the complaint. Plaintiff, realizing the omission, requested that she be permitted to amend process pursuant to Federal Rule 4(h). The District Court dismissed the complaint finding that the statute of limitations had run. Plaintiff appealed to the Court of Appeals for the Fifth Circuit arguing that the statute of limitations was tolled upon the filing of the petition and that due diligence was exercised in procuring service. The Court of Appeals agreed, vacating and remanding to the trial court. (Pet. App. B).

REASONS FOR DENYING THE WRIT

(1) This case does not involve an important question of Federal or State Law which must be settled by this Court. This case involves a question of procedure involving the application and adaptation of the Texas tolling doctrine as developed in Texas in the context of Federal Court procedure.

Petitioner/Defendant does not dispute that under Texas law, if a Plaintiff files her lawsuit within the applicable statute of limitations, the deadline for service is tolled, so long as Plaintiff makes diligent efforts to obtain service of process. Due diligence being a question of fact. (Pet. pg. 4), *Fluor Engineers & Constructors, Inc. v. Southern Pacific Transportation Company,* 753 F.2d 444 (5th Cir. 1985); Vernon's Ann. Civ. St. Art. 5526; *Dunham v. Innerst,* 50 F.R.D. 372 (M.D. Pa. 1970).

The Texas tolling doctrine is an equitable doctrine. The statute of limitations is tolled by the filing of the Petition within the limitation period so long as the second requirement of diligence in procuring the issuance and service of citation is met. *Rigo Manufacturing Co. v. Thomas,* 458 S.W.2d 180, 182 (Tex. 1970); *Zale Corporation v. Rosenbaum,* 520 S.W.2d 889, 890 (Tex. 1975).

In the case at hand, the Petitioner/Defendant actually received a copy of the Respondent/Plaintiff's complaint. Petitioner/Defendant admits to the receipt of the complaint, not once, but two times in a letter dated April 11, 1984 (Pet. App. G, pgs. 35a, 35b). The courts have treated the receipt of the complaint as process. *Wieland v. Wickard,* 4 F.R.D. 250 (E.D. Wis. 1945).

The absence of the summons is merely a *defect in service,* which may be cured by a court permitting an issuance of a summons pursuant to Rule 4(h), F.R.C.P. *See Fluor,* 753 F.2d at 449, citing *Great Plains Crop Management, Inc. v. Tryco Manufacturing Co.,* 554 F. Supp. 1025, 1028 (D. Mont. 1983).

Rule 4(h) gives a trial court extensive discretion to allow the amendment of process unless it ". . . clearly appears that material prejudice would result to the sub-

stantial rights of the party against whom the process is issued." *See Fluor*, 753 F.2d at 450; *Dunham*, 50 F.R.D. at 374, citing *Infotronics Corporation v. Varran Associates Corporation*, 45 F.R.D. 91 (S.D. Tex. 1968); 2 J. Moore, Federal Practice, 2d ed., § 4.44, pg. 1295.52, 1295.53. *See also* Wright & Miller, Federal Practice and Procedure, Civil § 1131.

Plaintiff claims that under federal application of state law, when a suit is dismissed, the statute of limitations is not tolled, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976); *Cardio-Medical Assoc. v. Crozier-Chester Med. Ctr.*, 721 F.2d 68, 77 (3rd Cir. 1983); *Norlock v. City of Garland*, 768 F.2d 654 (5th Cir. 1985). However, each of these cases are Rule 4(j) F.R.C.P. "dismissal cases" wherein the appellants are asking for relief from a court's denial of their respective motions to reinstate. This is not the issue in this case. Respondent/Plaintiff's Motion to Reinstate was *granted*. A reinstatement of an action operates to place the action in the same position as if an order to dismiss was never entered. *See Childs v. Mayo*, 73 Tex. 76, 11 S.W. 154 (1889); *Cotton v. Lyter*, 81 Tex. 10, 16 S.W. 553 (1891).

Yet Petitioner/Defendant persists in arguing that this case is a Rule 4(j) F.R.C.P. dismissal case rather than a Rule 4(h) F.R.C.P. amendment of process case by continuing to raise the question of good cause or good faith. However, those questions are not before the trial court because the court had already addressed those issues when it reinstated Respondent/Plaintiff's case. Therefore, the only issue that should have been before the Trial Court was whether or not it would permit a Rule 4(h) amendment to cure a defect in service.

(2) The Court of Appeals decision in the present case is not in conflict with any other circuit or Texas law. The present decision correctly holds that there has been a defect of service which will now require the Federal Court's consideration of Respondent's Motion for Rule 4(h) amendment. *Fluor,* 753 F.2d at 449. A hearing on Respondent's Motion for Rule 4(h) amendment will permit the Trial Court to consider those factors which have not yet been addressed, i.e. whether or not an amendment would result in material prejudice to the substantial rights of the party against whom the process is issued; *Fluor,* 753 F.2d at 450; whether it would be an exercise in futility, *Wieland,* 4 F.R.D. 250; and whether or not Respondent/Plaintiff is correcting an error or mistake or is guilty of dilatory tactics. *See Wieland,* 4 F.R.D. at 253; *See also Jefferson v. Stockholders Publishing Co.,* 194 F.2d 291 (9th Cir. 1952); *H. Alpers & Association v. Omega Precision Hand Tools, Inc.,* 62 F.R.D. 408 (D.C. Pa. 1974). It must be noted in response to the Petitioner's arguments that the mere passage of time does not by itself indicate lack of due diligence. This is a question of fact which the Federal Court never reached or considered.

Finally, the present decision in no way abrogates the 120 day service provision in Rule 4. On the contrary, the present decision adopts the purpose and intent of Rule 4—actual notice. Actual notice is the goal of the rule relating to service of summons. The absence of a summons is merely a *defect* in service, which may be cured by permitting a Rule 4(h) amendment. *Fluor,* 753 F.2d 444, 449 (5th Cir. 1985) citing *Great Plains Crop Management, Inc.,* 554 F.Supp. 1025, 1028. Rule 4 is to be read in a manner which effectuates its function

of timely notice *without creating technical traps for the unwary. Fluor,* 753 F.2d at 449, (emphasis added).

Petitioner/Defendant argues that Respondent/Plaintiff under these facts could take a default without affording Defendant his due process "day in court". However, nothing could be further from the truth—all that is requested is a 4(h) amendment to cure a service defect, which would provide all parties with their "day in court".

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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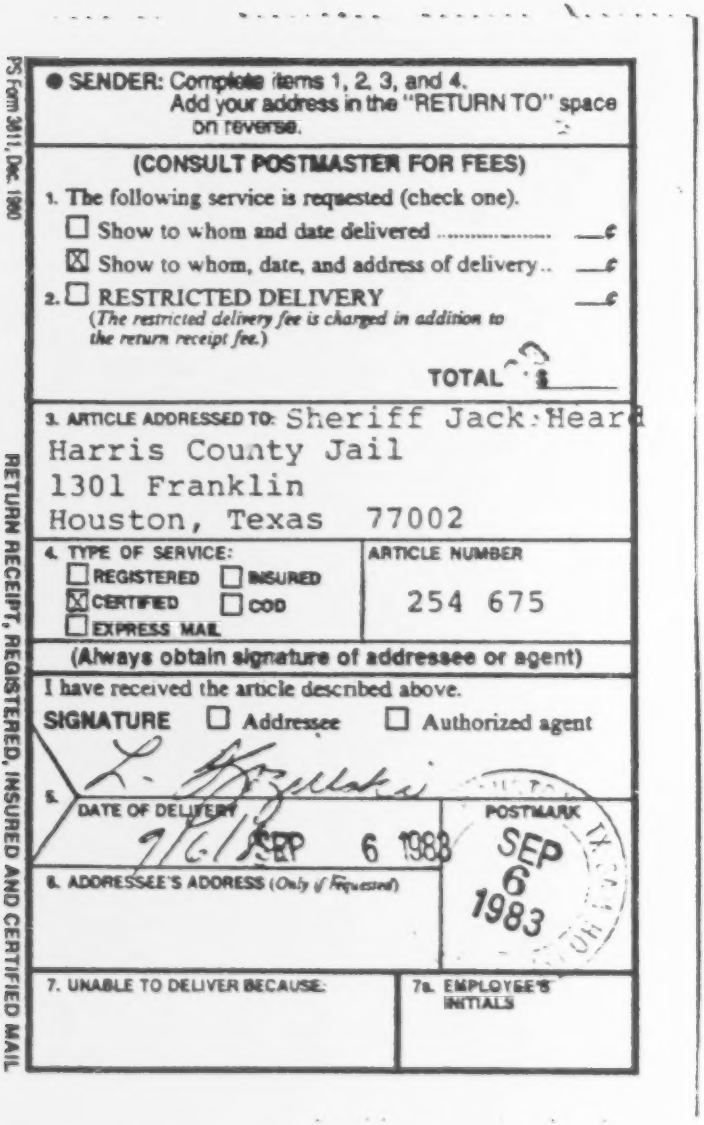
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief in Opposition was sent to all interested parties in this case by U.S. Certified Mail, Return Receipt Requested on this the _____ day of October, 1987.

_____

GEORGE J. PARNHAM

APPENDIX A



PS Form 3811, Dec. 1980

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
- ☐ Show to whom and date delivered ..... ¢
- ☒ Show to whom, date, and address of delivery.. ¢
2. ☐ RESTRICTED DELIVERY ¢
(*The restricted delivery fee is charged in addition to the return receipt fee.*)

TOTAL $

3. ARTICLE ADDRESSED TO:
Sheriff Jack Heard
Harris County Jail
1301 Franklin
Houston, Texas 77002

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
254 675

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

L. Kozlaski

5. DATE OF DELIVERY
9/6/83 SEP 6 1983

POSTMARK
SEP 6 1983

6. ADDRESSEE'S ADDRESS (*Only if Requested*)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

APPENDIX B

April 3, 1984

Sheriff Jack Heard
Harris County Jail
1301 Franklin
Houston, TX 77002

RE: Millicent Curry v.
Sheriff Jack Heard, et al

Dear Sir:

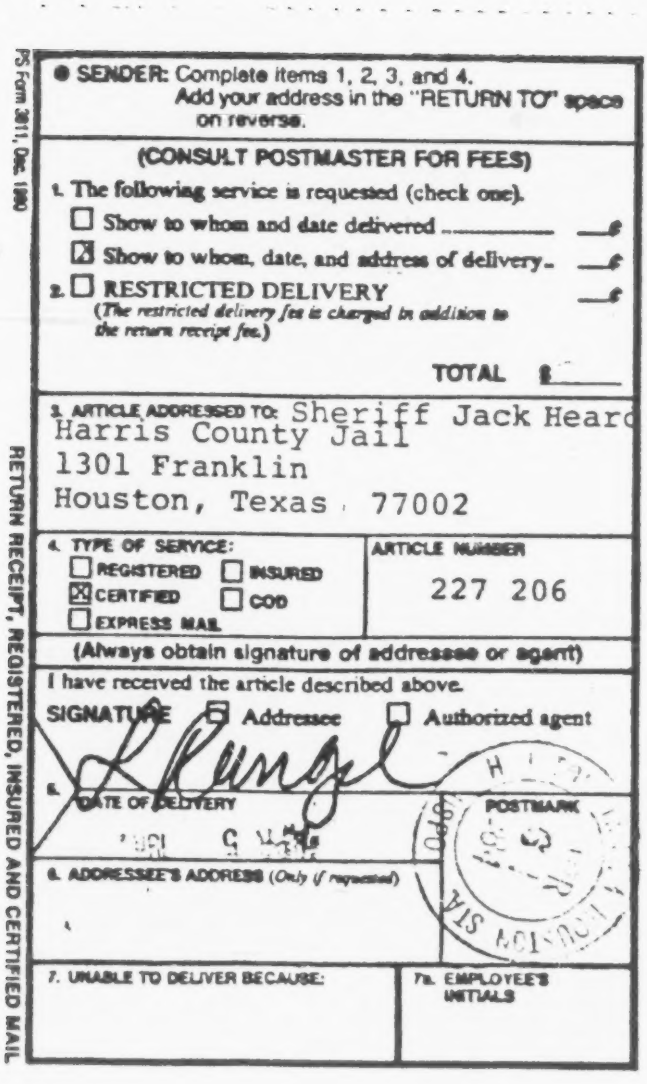
Enclosed please find another copy of the Complaint filed in Civil Action H-83-5283. No answer has been filed at this time and we believe it is merely as the result of a mistake or inadvertence on the part of your office. Please let us know if you intend to answer or if we must proceed with a default judgment.

Thank you for your attention in this matter.

Sincerely,

Jacqueline Taylor

JT/ml
Enclosure



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(CONSULT POSTMASTER FOR FEES)

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- ☒ Show to whom, date, and address of delivery.. ¢
2. ☐ RESTRICTED DELIVERY ¢
(*The restricted delivery fee is charged in addition to the return receipt fee.*)

TOTAL $

3. ARTICLE ADDRESSED TO: Sheriff Jack Hearc
Harris County Jail
1301 Franklin
Houston, Texas 77002

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
227 206

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. DATE OF DELIVERY

POSTMARK

6. ADDRESSEE'S ADDRESS (*Only if requested*)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL